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IN THE

Supreme Court of the United States

October Term, 1970
No. 1643

MARLON BRANDO,

Petitioner,

vs.

ROBERT COFFMAN, ROBERT FREDERICKS and OWEN C. BROWN,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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I.

The Judgment of the District Court of Appeal Is "Final" for Purposes of Review Under 28 U.S.C.A. §1257.

Respondents have raised the argument that the judgment of the District Court of Appeal is not a "final judgment" subject to this court's review under 28 U.S.C.A. §1257. Respondents have cited three cases to support their argument.

Market Street Ry. Co. v. Railroad Commission of the State of California, 324 U.S. 548 (1945) did not involve a judgment affirming or overruling a demurrer. The rule stated in that case in 1945 (*i.e.*, that to be "final", a judgment must effectively determine the litigation and must not be merely an interlocutory or in-

termediate step in such litigation) has been disregarded time and again in cases decided by this court over the past 26 years. The cases cited on page 9 of the petition are but a few of such cases.

Great Western Telegraph Co. v. Burnham, 162 U.S. 339 (1896) held *only* that when the highest court of a state, upon a first appeal, in ordering a demurrer sustained, decides a federal question against plaintiff, and remands the case to the trial court which thereafter sustains the demurrer and enters a judgment of dismissal, plaintiff cannot have the trial court's judgment reviewed by this Court unless that trial court judgment has first been re-appealed to the state appellate court, because the judgment of the *trial* court is not a final judgment *in the highest court of the state* in which a decision in the suit could be had.

Admittedly, the *Burnham* case does contain dictum indicating that a state supreme court's order requiring the sustaining of a demurrer is not "final". Aside from the fact that we do not have such an order in the present case, this court has widely departed from the dictum of the *Burnham* case, which was decided over 75 years ago.

In *Pope v. Atlantic Coast Line Railroad Co.,* 345 U.S. 379 (1953), a case cited by both petitioner and respondents, this court held that a judgment by the Georgia Supreme Court overruling a demurrer was "final" for purposes of review by this court.

Mills v. State of Alabama, 384 U.S. 214 (1966) reaffirmed that the recent trend toward expanding the concept of "finality" (see cases cited on page 9 of the petition) encompasses a judgment overruling a demurrer, especially when the national policy of protect-

ing free speech is involved. As stated on pages 221-222 of the concurring opinion:

> "Indeed even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution. *Dombrowski v. Pfister,* 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22; *Cameron v. Johnson,* 381 U.S. 471, 85 S. Ct. 1751, 14 L. Ed. 2d 715. As already noted, this case has brought editorial comment on election day to a halt throughout the State of Alabama. Our observation in *NAACP v. Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405, has grim relevance here: 'The threat of sanctions may deter * * * exercise [of First Amendment rights] almost as potently as the actual application of sanctions.' "

It is petitioner's contention that a civil libel suit for $6,000,000.00 by individual officers of a criticized government agency is as chilling to the exercise of freedom of speech as a criminal prosecution by the government agency itself.

As respondents admit on page 3 of their brief, the constitutional questions presented and decided by the District Court of Appeal upon the appeal from the trial court's judgment upon demurrer are now the law

of the case, and are not open to consideration upon subsequent appeals to the California Appellate Courts. *Blatz Brewing Co. v. Collins,* 88 Cal. App. 2d 438, 444 (1948). This Court has held that when an issue has been decided by a state court so as to become the law of the case, this court may review the state court's determination of that issue, even though further state proceedings are contemplated. *Johnson v. Muelberger,* 340 U.S. 581, 583 (1951).

As in *Mills v. State of Alabama, supra,* (freedom of speech), *Pope v. Atlantic Coast Line Railroad Co., supra,* (Federal Employee's Liability Act), and *Local #438 Construction & General Laborer's Union v. Curry,* 371 U.S. 542 (1963), (national labor policy), this case involves critical questions of important national federal policy which should not be denied an opportunity for immediate review by this Court until the expensive and time consuming formality of a trial is completed.

Indeed, the policy underlying the requirement of finality in 28 U.S.C. §1257 is best served by determination of important federal questions at the earliest opportunity, when otherwise the petitioner will be subjected to long and complex litigation which may prove a waste of time for all concerned if the Supreme Court thereafter decides the federal questions in petitioner's favor. *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555, 558 (1963).

This case is no different in its present posture from that of *Local #438 Construction & General Laborer's Union v. Curry, supra,* in which this Court reviewed a state court judgment granting a preliminary injunction which had the effect of requiring a trial on the

merits of the suit for a permanent injunction. This Court held in *Curry* that it should review the state court interlocutory judgment because the national federal labor policy would have been subverted by allowing a trial on the merits in the state court. Similarly, if petitioner is correct in his constitutional arguments, the national federal policy of protecting free speech will be subverted by allowing a trial on the merits in this case.

II.
Conclusion.

The crucial importance of the free speech issues involved in this case and the fact that the federal questions raised herein cannot ever be reviewed by the California Courts require a finding by this Court under the authorities cited by petitioner that the District Court of Appeal's judgment is "final" for purposes of review by this Court.

Dated: May 27, 1971.

Respectfully submitted,

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